IN THE UPPER TRIBUNAL (IAC) **Case: JR/1617/2020; JR-2020-LON-001098**

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BEFORE THE HON. MRS JUSTICE THORNTON DBE

The Queen on the Application of AWG (A child by his litigation friend KWG)	**Applicant**
-v-	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

FINAL ORDER

Having considered all documents lodged and having heard, Michelle Knorr of counsel and Hafsah Masood of counsel, at a hearing on 22-23 June 2022;

It is ORDERED that:-

1. The application for judicial review is granted, for the reasons set out in the judgment.

2. There be declarations that the Respondent's decisions dated 20 August 2019, 24 October 2019, 19 March 2020 and 13 May 2020 are unlawful and in breach of the common law duty of enquiry, Dublin III, Article 8 ECHR, and Article 7 of the Charter of Fundamental Rights.

3. The parties have 12 weeks from the date of this order to try to reach an agreement on damages. If damages are agreed the Applicant is to notify the Tribunal within 7 days of agreement. If damages are not agreed, the issue of damages is to be decided on paper unless on receipt of the parties' submissions the Court considers an oral hearing is necessary, and:
    i. The Applicant is to file and serve written submissions on damages, if so advised, within 15 weeks from the date of this order;
    ii. The Respondent is to file and serve written submissions on damages, if so advised, within 21 days of receipt of the Applicant's submissions on damages;
    iii. The Applicant is to file and serve any Reply to the Respondent's submissions on damages, if so advised, within 7 days of receipt of the Respondent's submissions.

4. The Respondent do pay the Applicant's reasonable costs to date to be assessed if not agreed; any future costs reserved.

5. The Applicant's legally aided costs be subject to a detailed assessment.

6. Neither party sought permission to appeal to the Court of Appeal and, having considered this issue myself as I am required to do by rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008, I refuse to grant permission as there are no properly arguable points of law raised on the facts of the case.

Case No: JR/1617/2020
JR-2020-LON-001098

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

Before:

THE HON. MRS JUSTICE THORNTON DBE

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Between:

The Queen on the Application of
AWG
(A child by his litigation friend
KWG)

Applicant

- and -

SECRETARY OF STATE FOR
THE HOME DEPARTMENT

Respondent

- - - - - - - - - - - - - - - - - - -

Michelle Knorr
(instructed by The Migrants' Law Project at Islington Law Centre) for the applicant

Hafsah Masood
(instructed by the Government Legal Department) for the respondent

Hearing dates: 22nd and 23rd June 2022

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J U D G M E N T

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The Hon. Mrs Justice Thornton:

Introduction

1. The Claimant was, at all material times, an unaccompanied minor. He sought asylum in Italy, in June 2019, on arrival from Eritrea. His adult sister lives lawfully in the UK with her husband, a British citizen. Italy requested the UK take charge of examining his asylum claim pursuant to EU Regulation 604/2013 (the Dublin III Regulation). The Secretary of State refused to do so on four occasions between August 2019 and July 2020, before accepting responsibility approximately 45 weeks later, on 1 July 2020, after which the Claimant was transferred to the UK in August 2020.

2. By the end of the hearing, it was common ground that the two grounds of claim requiring resolution by the Court are:

    (1) whether the refusals of the Secretary of State to accept the TCR during the period August 2019 – July 2020 were unlawful in containing public law errors; and

    (2) whether the refusals breached the Claimant's right to a family life under Article 8 of the European Convention on Human Rights and Article 7 of the EU Charter of Fundamental Rights.

2. The Claimant seeks declarations and damages in relation to the refusals and consequent delay in his arrival in the UK. This judgment concerns liability and does not address issues relating to relief and/or damages.

Factual Background

3. The Claimant was born on 1 September 2004 in Eritrea. He left Eritrea at the age of 12 years. He arrived in Italy after a long journey from Eritrea, during which time he was detained, beaten and starved in Libya by traffickers. He was taken by UNHCR

officials to a government centre in Libya where he waited for around a year until he was transported to Italy as part of an emergency humanitarian evacuation, jointly managed by the UNHCR, the Libyan Ministry of Interior and the Italian Government.

4. He arrived in Italy in May 2019 aged 14 years, alone, and was placed in the care of the Italian authorities. He lodged an asylum claim in June 2019. On 1 July 2019, he learnt that his father had died.

5. On 19th July 2019 Italy made a 'Take Charge Request' (TCR) of the UK pursuant to the Dublin III Regulation. The TCR included information about the Claimant's adult sister, Kisanet Gebreyesuse Weldeab, who was said to be living in the UK with her husband, a British Citizen. The documents accompanying the TCR included a copy of Ms Weldeab's UK residence permit; a copy of her husband's British passport, a council tax statement and rent statements issued by Leeds City Council in relation to a property where Ms Weldeab and her husband were said to reside; a copy of a family tree document, a record of an interview conducted by the Italian authorities with the Claimant about his family. and two reports, from a person described as the Claimant's 'legal counsel' and a second report by a person described as 'the community manager'.

6. The record of the interview with the Claimant included information about his parents and six siblings, the whereabouts of relatives in Europe, including his sister in Leeds and details of their relationship. The Claimant had last seen his sister in 2015, before she left Eritrea to join her husband in the UK. They lived together and she took care of him, as he was the younger brother. They spent a lot of time together. The report from Legal Counsel concluded that "*considering the child's tender age and his particular vulnerability, and due to the excellent willingness shown by his sister and husband to welcome him, it can be considered that family reunion is in the primary interest of the child."* The report from the community manager stated that

> *The path of integration and autonomy of the minor in question has slowed down due to a tragic event:*
> *Abel's father passed away.*

From the words he uses in telling his personal story can be perceived a strong bond with the family of origin, despite the difficulties of a life of hardship.

Gradually the strength of his character allowed him to re-emerge and, step by step, to take back the management of his everyday life.

The educational team is aware of the fact that the child has frequent telephone conversations with his sister with whom family reunification is hoped. As is evident, also as a consequence of the recent mourning, it seems very important in the minor's interest to be able to approach other members of his family nucleus. The support that he could receive from being close to his sister, we think it would be very useful for the child's good development and positive growth."

7. On or around 8 August 2019, a check was conducted by the Secretary of State's European Intake Unit ("EIU") on Ms Weldeab who had entered the UK as the spouse of a settled person following a successful entry clearance application. The Central Reference System (CRS) is a web-based application that contains entry clearance data from diplomatic missions overseas. The search returned no results. Home Office paper file was requested from storage but did not reveal any family information on file on Ms Weldeab.

8. On around 13 August 2019, the EIU received a completed form from Ms Weldeab in response to a pro forma letter informing her that Italy had made a TCR in respect of the Claimant, asking for confirmation that she was related to the Claimant and requesting that she complete a form, providing as much detail as possible and to provide any additional evidence proving that she and the Claimant were related. The form was completed in full.

9. The relevant GCID records for 20th August note that

"*TCR received from Italy. Applicant wishes to reunite with his sister who resides in the UK. Kisanet Gebreyesus Weldeab came into the UK as a spouse of a settled person in 2018 therefore there are no interview documents or family information for her in the Home Office file…*

A family tree, and a document where the applicant was questioned with regards to his family has been provided however <u>this is not substantial evidence</u> which verifies the

familial link...This case to be rejected as the relation between the applicant and his sister has not been established..” (emphasis added)

“I confirm that in making this decision I have considered all evidence submitted and all evidence held by the Home Office”

10. On 20 August 2019, the Secretary of State wrote to Italy refusing the TCR. The following reasons were given:

‘We have examined all the supporting documents provided with the take charge, and have examined the information provided within the Home Office records, however the documents submitted with the take charge is not adequate evidence to verify the familial link between the applicant and Kisanet Gebreyesus Weldeab. If you have any further information or evidence which can verify the relationship between the applicant and Kisanet Gebreyesus Weldeab who resides in the UK, you are invited to submit this to the UK.’

11. On 10 September 2019, Italy requested the UK to reconsider the request, stating that it was gathering more information and evidence regarding the family link. A statement from Ms Weldeab was subsequently provided.

12. A GCID entry dated 21 October 2019, records the Secretary of State’s response

“A statement has been provided by the sister residing in the UK however this is not reasonable evidence which verifies the familial link. MS have stated if you do not have any information about the minor’s sisters family we kindly ask you to interview her. However, the interview will not be possible as this information is provided after the take charge request therefore the information provided by the sister would not be used to evidence the familial link. Re-examination to be rejected.”

13. On 24 October 2019, on re-examination, the Secretary of State refused the TCR on the basis that “*substantial evidence is required to verify the familial link*” and “*the relation had not been established*”.

14. On 15 November 2019 Italy made a second request that the UK re-consider the request, stating that:

"Italy find that these documents contain enough and well-grounded information for the United Kingdom to decide upon the request and are proof of the relationship. Furthermore, if the UK still have concerns about the relation, Italy asks to be so kind to…proceed with an interview of the sister and to do it as soon as possible…also in the consideration of the best interest of the Applicant."

15. On 19 March 2020, the Secretary of State refused the second re-examination request, noting that the deadline for a request for re-examination had passed. Accordingly, the UK now considered Italy to be the responsible Member State.

16. On 23 March 2020, Italy made a third request for the UK to re-examine the TCR, taking issue with the Secretary of State 's response of 19 March 2020. On 13 May 2020, the Secretary of State reiterated her position.

17. On 29 May 2020, a fourth re-examination request was received from Italy. A letter of claim was sent on behalf of the Claimant.

18. On 1 June 2020, Italy made a TCR request pursuant to Article 17(2) of Dublin III, accompanied by the same documents sent with the TCR in July 2019.

19. On 3 June 2020, the EIU sent the Claimant's sister another pro forma letter (the same as on 8 August 2019) and a notification to the relevant local authority (where the sister resided) to inform them of the TCR. On 8 June 2020, a completed form was received from the sister.

20. On 12 June 2020, the Secretary of State responded to the letter of claim.

21. On 18 June 2020, a judicial review claim was filed, challenging the Secretary of State's decisions of 20 August 2019, 24 October 2019, 19 March 2020 and 13 May 2020.

22. On 25-26 June 2020, the Secretary of State decided to accept the TCR, subject to outstanding safeguarding and security checks. A second CRS check on the sister had returned her entry clearance application. The family information on the application

matched the details given by the Claimant. Accordingly, the Secretary of State was satisfied that the family link was established.

23. On 26 June 2020, the EIU requested an assessment from the social services department of Leeds City Council. On 29 June 2020, a positive assessment was received from the local authority raising no safeguarding concerns.

24. On 1 July 2020, the Secretary of State wrote to Italy accepting the TCR.

25. On 13 August 2020, the Claimant was transferred to the UK.

Legal Framework

Introduction

26. EU Regulation 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national is referred to as the Dublin III Regulation. It establishes a method for the allocation of responsibility between Member States for the examination of claims for asylum (international protection) made anywhere within the EU. One of its aims is that there will only be a single state responsible for dealing with an asylum claim, namely the state where an applicant is physically present. This prevents an asylum applicant being repeatedly transferred from one state to another. There are some circumstances, however, in which an applicant may be transferred to another state. The initial stage is about determining responsibility for dealing with a claim. Where a Member State is responsible or accepts responsibility under Dublin III, the applicant is transferred and permitted entry to the territory of the Member State to enable the examination of their application for international protection.

General Principles and Safeguards

27. Chapter II of Dublin III (Articles 3-6) sets out General Principles and Safeguards. Article 3.1 contains the foundational provision:

"Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible."

Unaccompanied minors

28. Unaccompanied minors are children who are travelling without an adult responsible for them. Recital 13 of Dublin III refers to the provision of the UN Convention on the Rights of the Child as follows:

> "*In accordance with the 1989 United Nations Convention on the Rights of the Child and with the Charter of Fundamental Rights of the European Union, the best interests of the child should be a primary consideration of Member States when applying this Regulation. In assessing the best interests of the child, Member States should, in particular, take due account of the minor's well-being and social development, safety and security considerations and the views of the minor in accordance with his or her background. In addition, specific procedural guarantees for unaccompanied minors should be laid down on account of their particular vulnerability."*

29. Article 6, is headed 'Guarantees for Minors' and provides as follows**:**

"1. The best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation.

….

3. In assessing the best interests of the child, Member States shall closely cooperate with each other and shall, in particular, take due account of the following factors:

a) family reunification possibilities;
b) the minor's well-being and social development;

c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;
d) the views of the minor, in accordance with his or her age and maturity.

4. For the purpose of applying Article 8, the Member State where the unaccompanied minor lodged an application for international protection shall, as soon as possible, take appropriate action to identify the family members, siblings or relatives of the unaccompanied minor on the territory of Member States, whilst protecting the best interests of the child." (emphasis added)

Determining the Member State Responsible

30. Articles 7 to 15 of Dublin III appear in Chapter III, which is headed "Criteria for determining the Member State responsible."

31. Article 8 is headed '*Minors'*. It provides that:

'1. Where the applicant is an unaccompanied minor, the Member State responsible shall be that where a family member or a sibling of the unaccompanied minor is legally present, provided that it is in the best interests of the minor…'

32. Article 17 introduces a degree of flexibility into the scheme, conferring a discretion on a State which is not responsible under the criteria in Dublin III, to examine an application for international protection. Article 17(1) provides that

"*By way of derogation from Article 3(1) each Member State may decide to examine an application for international protection lodged with it by a third country national… even if such examination is not its responsibility under the criteria laid down in this Regulation."*

33. Article 17(2) states:

"*The Member State in which an application for international protection is made and which is carrying out the process of determining the Member State responsible, or the Member State responsible, may, at any time before a first decision regarding the substance is taken, request another Member State to take charge of an applicant in*

order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that other Member State is not responsible under the criteria laid down in Articles 8 to 11 and 16…".

34. A TCR under Article 17(2) can be made '*at any time before a first decision regarding the substance [of the application for international protection] is taken'*, and the requested Member State '*shall reply to the requesting Member State within two months of receipt of the request*' (first and third sub-paragraphs of Article 17(2)).

Obligations of the Member State responsible

35. Article 18(1) provides that the Member State responsible under the Regulation shall be obliged to:

> *"a) take charge under the conditions laid down in Articles 21, 22 and 29 of an applicant who has lodged an application in a different Member State."*

Procedures for taking charge

36. Chapter VI is concerned with procedures for taking charge (and taking back). Article 21(1) requires the requesting Member State to make a take charge request '*as quickly as possible'* and in any event within three months of the date on which the applicant lodged a claim for international protection. A failure to do so means that the responsibility for examining the application will lie with the Member State in which the application was lodged.

37. Article 22(1) provides:

> *"The requested Member State <u>shall make the necessary checks</u> and shall give a decision on the request to take charge of an applicant within two months of receipt of the request"* (emphasis added).

38. Article 22(7) provides that a failure to act within the two-month period results in the requested Member State becoming responsible by default.

39. Article 22(2) provides that "*in the procedure for determining the Member State responsible elements of proof and circumstantial evidence shall be used*." Proof is said to refer to "*formal proof which determines responsibility pursuant to this Regulation, as long as it is not refuted by proof to the contrary*." Circumstantial evidence is said to refer to "*indicative elements which while being refutable may be sufficient, in certain cases, according to the evidentiary value attributed to them. Their evidentiary value shall be assessed on a case-by-case basis*."

40. Article 22(4) provides that the requirement of proof should not exceed what is necessary for the proper application of this Regulation.

41. Article 22(5) provides that "*if there is no formal proof, the requested Member State shall acknowledge its responsibility if the circumstantial evidence is coherent, verifiable and sufficiently detailed to establish responsibility."*

Remedies

42. Article 27(1) provides that "*The applicant … shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal*."

Transfers

43. Article 29(1) provides that the transfer of a person from the requesting state to the Member State responsible shall be carried out as soon as practically possible and "*at the latest within six months"* of acceptance of the request to take charge.

Implementing Regulation: evidential requirements and request for re-examination

44. The Dublin III Regulation is supplemented by Regulation (EC) No 1560/2003 (as amended by Regulation No 118/2014) ("the Implementing Regulation").

45. Article 3(2) 'Processing requests for taking charge' provides that:

> *"Whatever the criteria and provisions of Regulation (EC) No 343/2003 that are relied on, the requested Member State shall, within the time allowed by Article 18(1) and (6) of that Regulation, check exhaustively and objectively, on the basis of all information directly or indirectly available to it, whether its responsibility for examining the application for asylum is established. If the checks by the requested Member State reveal that it is responsible under at least one of the criteria of that Regulation, it shall acknowledge its responsibility"* (emphasis added).

46. Annex II includes lists of proof and circumstantial evidence. For Article 8 requests, the lists are as follows:

"LIST A

MEANS OF PROOF

I. Process of determining the State responsible for examining an application for international protection

1 Presence of a family member, relative or relation (father, mother, child, sibling, aunt, uncle, grandparent, adult responsible for a child, guardian) of an applicant who is an unaccompanied minor (Article 8)

Probative evidence

- *written confirmation of the information by the other Member State;*
- *extracts from registers;*
- *residence permits issued to the family member;*
- *evidence that the persons are related, if available;*
- *failing this, and if necessary, a DNA or blood test.*

LIST B

CIRCUMSTANTIAL EVIDENCE

I. Process of determining the State responsible for examining an application for international protection

1. Presence of a family member (father, mother, guardian) of an applicant who is an unaccompanied minor (Article 8)

Indicative evidence

- *verifiable information from the applicant;*
- *statements by the family members concerned;*
- *reports/confirmation of the information by an international organisation, such as UNHCR."*

47. Article 5 entitled '*Negative reply'* provides:

"1. Where, after checks out, the requested Member State considers that the evidence submitted does not establish its responsibility, the negative reply it sends to the requesting Member State shall state full and detailed reasons for its refusal.

2. Where the requesting member State feels that such a refusal is based on a misappraisal, or where it has additional evidence to put forward, it may ask for its request to be re-examined, within three weeks following receipt of the negative reply. The requested Member State shall endeavour to reply within two weeks. In any event, this additional procedure shall not extend the time limits laid down in [Articles 22(1) and (6) of the Dublin III Regulation]."

48. Annex X of the Implementing Regulation, which contains information for applicants under Dublin III, states that *'[t]he entire duration of the Dublin procedure, until you are transferred to that country may, under normal circumstances, take up to 11 months.'*

Family life - the European Convention on Human Rights and the Charter of Fundamental Rights

49. Article 8 of the ECHR provides that:

"1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 there shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety of the economic well-being of the

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others."

50. Article 7 of the Charter of Fundamental Rights provides that "*Everyone has the right to respect for his or her private and family life home and communications*".

51. Reliance was also placed by the Claimant on Article 24(2) "*in all actions relating to children whether taken by public authorities or private institutions, the child's best interests must be a primary consideration"* on the basis that whilst under the ECHR the best interests principle is incorporated into Article 8 under the CFR is a separate right.

52. It was common ground by the end of the hearing that Article 8 ECHR and Article 7 CFR give rise to the same issues and the reference to and submissions on Article 8 ECHR are also intended to cover Article 7 CFR.

53. It was common ground that there is family life between the Claimant and his sister for the purposes of Article 8 ECHR and Article 7 CFR.

54. The jurisprudence of the European Court of Human Rights has drawn a distinction between cases where migrants who have been lawfully settled in a country for a long time face deportation or expulsion and cases where an alien is seeking admission to a host country. The former entails the possible breach of the negative obligation in Article 8(2) (*there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society..).* The latter entails the possible failure of the state to comply with a positive obligation to permit the enjoyment of family life in that country. It concerns not only family life but also immigration. A positive obligation may therefore fall upon a State under Article 8 ECHR to admit a person to its territory for family reunion. It was common ground the present case concerns an allegation of a breach of a positive obligation of Article 8 ECHR.

55. Although the criteria developed in the context of a negative obligation cannot be transposed automatically into a positive obligation, the Courts have said that the applicable principles are, nonetheless, similar. In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the state enjoys a certain margin of appreciation. The extent of any positive obligation to admit a person varies according to the particular circumstances of the persons involved and the general interest. Where children are involved, their best interests are a primary consideration in the proportionality exercise and must be afforded significant weight (*MM (Lebanon) v Secretary of State for the Home Department [2017] UKSC 10; [2017] 1 WLR 771* (Supreme Court) Baroness Hale at 104-105, 109, 114). (*R (ZT (Syria) and others) v. Secretary of State for the Home Department* [2016] EWCA Civ 810, [2016] 1 W.L.R. 4894, Beatson LJ at 64)).

Submissions

56. On behalf of the Claimant, it is submitted that, in rejecting the claimed family relationship between the Claimant and his sister, the Secretary of State failed to properly assess and weigh up the relevant evidence, failed to give proper reasons and failed to properly apply the standard of proof. A requirement of "substantial evidence" was imposed that has no basis in law and effectively placed the onus on the Claimant and his sister to provide documentary proof. The Secretary of State 's failure to properly check Home Office records was a clear breach of the investigatory duty and policy. The failure to engage the local authority in an assessment was also a breach of the Secretary of State's investigative duty. The Courts have repeatedly found, and the Secretary of State has accepted, that the local authority may be able to contribute evidence to the family link. There was therefore a breach of investigative duty and a breach of Article 8, Article 3(1) and Article 18(1) of Dublin III because the TCR was refused when the Secretary of State should have accepted responsibility. The Secretary of State was seeking to significantly expand the approach in R (FwF) v Home Secretary ([2021] 1 WLR 3781) by relying on the proposition that Dublin III includes an opportunity to remedy a breach of Dublin III to submit there was no breach of Article 8 Dublin III (and associated provisions). (Ground One)

57. The unlawful refusals of the TCR did not strike a fair balance for the purposes of Article 8 ECHR / Articles 7 & 24 CFR. A positive obligation arose to accept the TCR. The Tribunal should follow the approach in R (BAA) v Home Secretary ([2021 EWCA Civ 1428) where FwF was distinguished and where the Court of Appeal held that if through illegality a child is deprived of the rights Dublin III gives him, he must be entitled to assert his Article 8 ECHR and Article 7 CFR rights. The fact that this is a positive obligation scenario does not justify a different approach. A non-incidental breach of Dublin III that results in a TCR being wrongly rejected when it should have been accepted is highly relevant to whether a fair balance is struck. The consequence of the illegality was a 10-month delay. The Claimant was only 14 years old. He was separated from his parents due to fleeing persecution, had no other family deemed suitable to care for him in Europe and was alone and in the care system in Italy. Those caring for him made clear that it was strongly in his best interests to be reunited with his sister, and promptly given that he had suffered the recent bereavement of his father. A delay of 10 months is significant for a 14-year-old with the Claimant's history. These factors outweigh the public interest in immigration control. There was also a procedural breach of Article 8 ECHR because of the investigatory duty breaches and the failure to properly assess best interests (Ground Two).

58. On behalf of the Secretary of State, it was submitted that the Secretary of State was entitled to conclude that the evidence was not sufficient to substantiate the family link, and the criteria in Article 8(1) Dublin III were not met. Sufficient reasons were given. The Secretary of State did not take an unlawful approach. She did not fail to apply the correct standard of proof. Nor did she place an onus on the Claimant to provide proof or misdirect herself about the correct approach to evidence under Dublin III. No requirement of "*substantial evidence*" was imposed. The Secretary of State considered that the circumstantial evidence was not "*coherent, verifiable and sufficiently detailed to establish responsibility*" (as per Art 22(5) Dublin III). The Secretary of State did check her records. The issue with the first CRS check may have been due to a spelling error or something similar when entering the sister's name on the system did not amount to a breach of the investigative duty and/or policy. At worst it was an administrative error. The failure to obtain a local authority assessment did not amount to a breach of the investigative duty because it is unlikely to have assisted in

substantiating the claimed family relationship. Even if the Secretary of State 's assessment in respect of the family link was wrong (which is denied), it does not follow that there was a breach of Article 8 of Dublin III or other provisions of Dublin III, although a breach of the investigative duty could technically amount to a breach of Dublin III. Dublin III lays down a system and procedures for the resolution of any issues and disputes relating to its application, including the responsibility criteria in Chapter III

59. A breach of Dublin III/unlawfulness does not ipso facto amount to a breach of Article 8 ECHR. A positive obligation to admit a Dublin III applicant does not arise under Article 8 ECHR merely because family life exists (for the purposes of Article 8 ECHR) and a decision to refuse the TCR has been found to be unlawful/breached Dublin III. None of the cases on which the Claimant relies are authority for this proposition (including MS and BAA (UT/CA)). The Applicant's position is contrary to FwF (CA). BAA (CA) does not say otherwise. As regards any breach of Article 8 ECHR, the Tribunal cannot shut its eyes to what has happened since the impugned decisions, i.e. the fact of acceptance and transfer and the overall length of the delay resulting from any illegally/breach of Dublin III which is highly relevant. The delay was at most – just over 4 months (i.e. the period in excess of the long-stop time limit under Dublin III. This delay was nowhere near long enough to breach Article 8 ECHR. In any event, fair balance was struck. There was no breach of the procedural aspect of Article 8.

Discussion

Errors in the decision making

60. On receipt of a Take Charge Request (TCR), the Secretary of State comes under duties of enquiry, investigation and evidence gathering pursuant to Dublin III and the 2003 Implementing Regulation. In particular, Article 6(4) provides that '*the Member State …. shall…take appropriate action to identify the ..siblings.* Article 22(1) provides that *"The …Member State shall make the necessary checks…'* Article 3(2) of the 2003

Regulation provides that '*the requested Member State shall…check exhaustively and objectively..'*. It was common ground between Counsel that the content of the duty is fact specific and contextually sensitive. It requires the Secretary of State to take reasonable steps to investigate the claim (R v MK, IK & HK [2016] UKUT 000231 (IAC)).

61. A duty of inquiry also arises at common law, commonly referred to as the Tameside duty, from the case in which it first featured – "*the question for the court is did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"* (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014* Lord Diplock at 1065b).

62. It was common ground that the Secretary of State's policy at the time provided for the early involvement of local authorities in the decision making about accepting responsibility for examining a minor's claim for asylum:

"You must ensure that both local authority children's social care services at the child's point of entry and where the child's family member, sibling or relative reside are notified of the transfer request under the Dublin III Regulation. This must be done as soon as possible after the formal request to take charge is received from the requesting state.

You must engage local authorities' children's social care teams throughout the process seeking their advice in every case…"

63. **The** Take Charge Request, received from Italy on 19 July 2019, contained a copy of the UK residence permit for Kisanet Gebreyesuse Weldeab, the person said to be Claimant's sister and later accepted as such by the Secretary of State. It also included a copy of her husband's British passport, a family tree, an interview with the Claimant, as well as a council tax statement and a rent statement, both of which had been issued by Leeds City Council for the address where Ms Weldeab and her husband were said to reside.

64. There was no dispute that Ms Weldeab, was lawfully present in the UK having made an entry clearance application and entered the UK as the spouse of a settled person.

65. On or around 8th August 2019, the European Intake Unit ("EIU") conducted a search of Ms Weldeab's files via an electronic 'Central Reference System' (CRS). The search produced no result. The EIU also called up Ms Weldeab's paper file but it did not contain any information on her family. In refusing the TCR, on the 20th August 2019, the Secretary of State explained to Italy that, '*We ….have examined the information provided within the Home Office records'*, which was not entirely accurate. The more accurate explanation was that no material information had been found.

66. The GCID records indicate that the family tree and interview with the Claimant were rejected as evidence to substantiate the claimed family link on the basis they were '*not substantial evidence which verifies the familial link*'. The same reference appears in the letter dated 24 October 2019 to Italy from the Secretary of State refusing the request (on re-examination) on the basis that "*substantial evidence is required to verify the familial link*" and "*the relation had not been established*". A statement from Ms Weldeab was rejected on the basis it was "*not reasonable evidence"*. Italy's suggestion that the sister be interviewed was rejected on the basis that '*this information is provided after the take charge request therefore the information provided by the sister would not be used to evidence the familial link. Re-examination to be rejected."* Leeds City Council was not approached or asked for any information relating to the family link.

67. As matters transpired, the CRS file had been searched in error. In June 2020, a second CRS search was done, in response it appears, to a new TCR request from Italy, this time pursuant to Article 17 of Dublin III. The second CRS search produced the entry clearance application, which in turn confirmed the claimed family link. Leeds City Council was asked to provide a best interests assessment in June 2020 and the Secretary of State accepted the TCR shortly after.

68. In response to questions from the Tribunal during the hearing, Counsel for the Secretary of State explained that the paper-based Home Office files should contain details of any application made from within the UK whilst the CRS contains entry clearance data from diplomatic missions overseas. If a person makes an application from overseas their details will be on CRS. In response to further questions, Counsel conceded that it would be reasonable to expect that there should have been some information about Ms Weldeab's application for entry clearance on file given she was in possession of a UK residence permit. In my judgment, on the basis of this concession, it should have been apparent to representatives of the Secretary of State, on consideration, that there might have been an error in the searches of Ms Weldeab's record given neither search had produced any results in circumstances where she was in possession of a residence permit. No consideration appears to have been given to the possibility of an error in this regard.

69. As matters transpired, the error lay in the first CRS search. Counsel for the Secretary of State suggested that this may have been due to a spelling error or something similar when entering Ms Weldeab's name on the system. She further suggested that this amounted, at worst, to an administrative error, not a breach of the Secretary of State's investigative duty. No witness evidence was provided on behalf of the Secretary of State to explain the search process so Counsel's submissions amounted to speculation in this regard. Moreover, it is not the initial search error that gives rise to concern but the failure to consider the implications of the nil returns.

70. Counsel for the Secretary of State accepted that the failure to involve the local authority earlier on in the decision-making process was a breach of policy but sought to submit that the breach was not material. It was said that any assessment was unlikely to have assisted in substantiating the claimed family relationship in circumstances where there had already been two opportunities to provide information to prove the claimed relationship. The first was the information included within the TCR itself, including the family tree and a record of the interview with the Claimant where he had been interviewed by the Italian authorities about his family relationships. A second opportunity came with the provision of information by Ms Weldeab in response to the information request on behalf of the Secretary of State.

71. However, the evidence in question was rejected by the Secretary of State on the basis it was not 'substantial' or 'reasonable' evidence. It is not clear what is meant by these terms. Counsel submitted that the references were no more than an exercise of the discretion available to the Secretary of State pursuant to Article 22(5) Dublin III to reject circumstantial evidence on the basis it was not cogent, verifiable or sufficiently detailed to establish responsibility. The difficulty with this submission is that there is no formal requirement under Dublin III to prove the family relationship. The evidential requirement in Annex II of the Implementing Regulation relates to the presence of the family member in the relevant Member State, as to which, a residence permit (which Ms Weldeab had produced) is determinative. In this context, it is to be noted that the Secretary of State had no evidence to cast doubt on the claimed family link. It appears from the GCID records that, in reality, the Secretary of State was only prepared to accept the family link if the link was evident in an entry clearance application on the basis this was evidence in existence prior to the TCR. If this was the position, it was not communicated to the Claimant, Ms Weldeab or their representatives, who therefore had no opportunity of satisfying an apparently unpublished evidential requirement. Instead, the evidence provided was rejected out of hand and Ms Weldeab was criticised for failing to provide documentary evidence when she completed the form.

72. In seeking to defend the Secretary of State's breach of her policy in failing to seek assistance from the local authority, Counsel submitted that the principal purpose of the local authority assessment is to address whether there are safeguarding concerns that will mean transfer would not be in the child's best interest and caselaw indicates a local authority assessment may not be required in all cases. However, the Secretary of State has previously accepted that a local authority assessment may assist in establishing the claimed family link. In the decision of the Upper Tribunal in FwF v SSHD (JR/1642/2019) reference is made to disclosure which confirmed that the Secretary of State's policy team were aware of the importance of [the local authority] in assessing the family link" (§ 48). In its ruling, the Upper Tribunal concluded that the local authority's '*assessment of a family link and the best interests of a child ought to have been central to the respondent's duty to investigate upon receipt of the TCRs…*' (§99) before going on to state that:

…100 The respondent's breach of policy is not inadvertent in this case but a departure from his published policy. Not only is it unlawful on ordinary public law principles but …

…It would be nonsensical for the respondent to merely notify the LA of the TCR and then not to follow this up with a request for an assessment of the family link and best interests of the children…" (99-100).

73. Accordingly, drawing the threads together; those acting on behalf of the Secretary of State ought to have considered that the nil returns from the searches on Ms Weldeab's files might suggest some sort of error in the search process. Consideration should have been given to repeating the searches (as eventually happened); asking the local authority for assistance in investigating the family link; additional assessment of the available information provided by Italy or Ms Weldeab and to interviewing Ms Weldeab. Instead, those acting on behalf of the Secretary of State closed their eyes to the implications of the nil returns, failed to ask for assistance from the local authority to plug the information gap; dismissed the available evidence out of hand and chose not to interview Ms Weldeab. These failings amount to a breach of the common law Tameside duty of inquiry. In addition, an unreasonable and unexplained evidential requirement was imposed on the Claimant and Ms Weldeab.

74. It was common ground that the four refusal requests stand or fall together on the basis that the re-examination requests by Italy were an opportunity to correct any public law errors in the first refusals and the opportunity to do so was not taken. Accordingly, I conclude that the Secretary of State acted unlawfully in refusing to accept responsibility for examining the Claimant's claim for asylum, by her decisions dated 20 August 2019, 24 October 2019, 19 March 2020, and 13 May 2020.

Breach of Dublin III

75. Counsel for the Secretary of State conceded that breaches of the investigatory duty could amount to a breach of Dublin III. In my judgment, for the reasons explained above, the Secretary of State is in breach of Article 6(4) of Dublin III in failing, to '*take appropriate action*', '*as soon as possible*' to *identify the Claimant's sibling*';

breach of Article 22(1) in failing to '*make the necessary checks'*, and breach of Article 3(2) of Regulation (EC) No 1560/2003 in failing to '*check exhaustively' ' on the basis of all information directly or indirectly available to it, whether its responsibility for examining the application for asylum is established and failing to 'acknowledge its responsibility."*

76. Counsel otherwise sought to submit that a breach of Article 8, or other provisions of Dublin III, does not necessarily arise from any unlawfulness in the Secretary of State's decision making. This is, she submitted, because Dublin III lays down a system and procedures for resolution of issues or disputes relating to the application of Dublin III. In particular, she pointed to the option available to Italy to make a re-examination request, pursuant to Article 5 of the Implementing Regulation, an option which had been exercised. Secondly, Italy had the option of making a further TCR, pursuant to Article 17, which it had done. Thirdly, Article 37(2) provides for a conciliation procedure if Member States cannot resolve a dispute on any matter related to the application of the Regulation. Finally, Article 27 provides the Claimant with the right to an appeal or review of a transfer decision before a court or Tribunal, an option exercised by the Claimant.

77. In making this argument, Counsel sought to mirror the analysis of the Court of Appeal in R(FwF) v Home Secretary [2021] 1 WLR 3781. In that case, the Court concluded that whilst the purported refusal of the TCR outside the specified two month period was unlawful, the legal remedy lay in Article 22(7) whereby the UK was deemed to have accepted the request and became obliged to take charge of the minors. On this basis, the '*many failings'* on the part of the Secretary of State including breach of her investigative duty and her own Dublin policy '*had the same legal and factual result, which is [a] period of delay…The real question is whether that period of delay involves a breach of Dublin III by the Secretary of State"* (§131 and §132). The failure to follow policy and breach of investigative duty were characterised as '*incidental unlawfulness'* (§139).

78. It is however, apparent from the Court's analysis in paragraphs 131 – 133 of the judgment in FwF that its reasoning in this respect was focussed on the particular

factual and legal context of that claim, namely default acceptance by the UK of responsibility for assessing the asylum claims, pursuant to Article 22(7). The distinction was confirmed by the Court of Appeal in R(BAA) v Secretary of State for the Home Department [2021] EWCA Civ 1428. FwF was said to be '*properly distinguishable'* on the basis that:

…the unaccompanied minors were still within the Dublin process. Because of the failure of the SSHD to respond in time, the Secretary of State had by default acquired responsibility for the claims for international protection. Under the Dublin III process, the responsibility remained with the United Kingdom for at least the six months provided, under Article 29.2 of Dublin III, to effect transfer. At the time of the hearing before the Upper Tribunal in FwF , the Dublin process was incomplete. Further, the timeframe for completion of the process was unexpired.…..

79. The position in BAA was said to be different "*From the time when BAA sought judicial review through to the time of the hearing before the UT, the Dublin III process was complete. Had legal action not been instigated there is no reason to think it would have been resumed…..The illegalities of approach taken here cannot properly be thought to be incidental since they led to the refusal of the TCR and the ostensible end of the Dublin process until they were challenged and exposed…"(*§ 95)

80. As in BAA, the present case is not a case of "default acceptance" of responsibility by the UK on the basis of a failure to respond to the TCR in time. The Secretary of State responded within the appropriate time limits but the decision making contained illegalities. The illegalities which I have identified led to the Secretary of State refusing the TCR on four separate occasions during the period from August 2019 – July 2020. At the point at which these proceedings were initiated, the Dublin process was at an ostensible end. Applying the analysis in BAA, the illegalities of approach cannot properly be thought to be "incidental".

81. In BAA it was said by the Court that, had legal action not been instigated, there was no reason to think the Dublin III process would have been resumed. It is not clear whether the same can be said here. The launch of judicial review proceedings coincided with a new TCR request by Italy pursuant to Article 17 Dublin III. One or other, or both, of these developments appears to have led to the re-start of the Dublin

decision making process whereby Ms Weldeab was sent a new form to complete, and a second CRS check was done. This time the CRS check produced Ms Weldeab's entry clearance application and the decision to accept the TCR followed. I accept that, to this extent, the significance of the illegalities becomes a question of the delay caused to the Claimant's eventual transfer to the UK, a point I return to below in the context of Article 8 ECHR. Nonetheless, I do not think that any similarities in this regard with FwF can affect the question of breach of Dublin III. In my judgment, there is a material difference between a remedy of default acceptance of responsibility on the part of the Member State which has conducted itself unlawfully (as in the case of FwF) and the remedies relied on by Counsel in the present case. They rely on the host Member State being prepared to repeat a TCR request or the applicant in question having the energy and resources to launch judicial proceedings to correct unlawfulness. In BAA the Court observed that: "*..the Dublin III procedure has been invoked, a TCR made in proper form. The operation of the system in the 'requesting state' has been effective, with the consequence that there can be no effective remedy against the requesting state or in the jurisdiction of the requesting state, but the problem arises from an unlawful act or omission in the state to which the TCR has been made"* (§62). The Court went on to conclude that the illegalities of approach were not incidental since they led to the refusal of the TCR and the end of the Dublin process until challenged and exposed (§ 95). In the present case, the evidence suggests that the Dublin III process only resumed, leading to exposure of the illegalities, when challenged by Italy and the Claimant.

82. The parties were agreed that it is more likely than not that the Secretary of State would have accepted that the family link was substantiated in August 2019 had the CRS check returned the results it did in June 2020. In my judgment, the Secretary of State was in breach of Article 8(1) Dublin III (the *Member State responsible shall be that where a sibling of the unaccompanied minor is legally present, provided that it is in the best interests of the minor')* in failing to accept responsibility for the Claimant during the period from 20 August 2019 to 1 July 2020.

83. Counsel for the Claimant also submitted, in passing, that the Secretary of State was in breach of Article 3(1) (Member States shall examine any application for international

protection) and Article 18(1) (the Member State responsible shall be obliged to take charge under the conditions laid down in Articles 21, 22 and 29…). I am not however persuaded that these Articles were breached. Those acting on behalf of the Secretary of State did examine the application and responded within time but made errors within the course of its examination. Transfer of the Claimant to the UK took place shortly after the TCR was accepted in July 2020.

Breach of Article 8 ECHR

84. At the start of the hearing, the parties appeared to consider they were in dispute as to the approach the Tribunal should adopt in assessing a breach, or otherwise of Article 8 of the European Convention on Human Rights. By the end of the hearing, the parties appeared to be largely in agreement as to the relevant principles but disagreed on their application to the facts of the present case.

85. The parties were agreed that there is family life between the Claimant and Ms Weldeab for the purposes of Article 8 ECHR and Article 7 CFR. They were also agreed that the present case concerns an allegation of a breach of a positive obligation under Article 8 ECHR, to admit the Claimant to the UK. The extent of the positive obligation to admit varies according to the particular circumstances of the persons involved and the general interest. Regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole and the state enjoys a certain margin of appreciation. Where children are involved, their best interests are a primary consideration in the proportionality exercise and must be afforded significant weight ((*MM (Lebanon) v Secretary of State for the Home Department [2017] UKSC 10; [2017] 1 WLR 771* (Supreme Court) Baroness Hale at 104-105, 109 & 114); (*R (ZT (Syria) and others) v. Secretary of State for the Home Department* [2016] EWCA Civ 810, [2016] 1 W.L.R. 4894, Beatson LJ at [64]).

86. By the end of the hearing, I did not understand there to be a material disagreement as to the proposition that a positive obligation to admit a Dublin III applicant does not

arise under Article 8 ECHR merely because family life exists (for the purposes of Article 8 ECHR) and the decision to refuse the TCR was unlawful and/or breached Dublin III. Nor do I understand, the Court of Appeal decisions in FwF and BAA to diverge in this respect. In FwF the Court of Appeal concluded even if the Secretary of State's failings amounted to a breach of Dublin III, that breach was not, ipso facto, a breach of Article 8 ECHR because the obligations imposed by Dublin III are not a mirror image of the obligations imposed by Article 8 ECHR (para 134-139). In BAA, the Court held that once it is established that a child claimant has been deprived of his/her rights under Dublin III, other than an 'incidental' error which did not alter the outcome, the court will consider evidence as to the underlying Article 8/Article 7 rights. In this context the Court went onto addressed the scenario which arose here, namely a resumed Dublin III process (in this case by virtue of the TCR request by Italy pursuant to Article 17 on 1 June 2020) stating that "*The court will have to consider whether, on the facts, the delay involved in that process would breach those rights. That delay would itself be a consequence of the illegality*" (§95 & 98).

87. Turning then to the delay in the present case: the parties were in dispute as to when the period of delay should be taken to have started. The Secretary of State submitted that in assessing breach, the Tribunal cannot shut its eyes to the fact that the TCR was accepted and the delay in accepting was at most just over 4 months - i.e., the period in excess of the 8 month period allowed to the UK under the Regulation (2 months to accept the TCR and 6 months to effect transfer). The approach of the Upper Tribunal in R(KF) v SSHD JR/1641/2019 should be followed. On behalf of the Claimant, it was said that a positive obligation to admit the Claimant arose from the point at which the Secretary of State should have accepted the family relationship. As a consequence, there was a 10-month delay which together with the Claimant's young age, traumatic history and vulnerability, all of which was known to the Secretary of State, made the breach particularly serious and did not strike a fair balance. The approach of the Upper Tribunal in MR v SSHD JR/16986/2020 should be followed.

88. In the case of KF, relied on in this context by the Secretary of State, the UK failed to respond to the TCR within the 2-month timetable laid down in the Regulation. Default acceptance by the UK of its responsibilities was deemed to arise at this point,

following which the scheme of the Regulation allows for a 6-month transfer window. The Upper Tribunal assessed the delay in the applicant arriving in the UK by reference to this 8 month 'longstop time limit' permitted under the Regulation and concluded that the delay amounted to 3 months and 6 days in excess of the longstop limit. The case of MR v SSHD relied on by the Claimant, did not concern default acceptance. The Secretary of State's refusal to accept the TCR had been made in time but on the basis of illegalities. Responsibility was accepted part way through the adjourned Tribunal hearing. The judge concluded that that a positive obligation to accept the applicant arose as at the date of the unlawful refusal of the TCR amounting to a delay of 13 months before the TCR was eventually accepted. On the facts, this delay had consequences of such gravity as to engage the operation of article 8(1) ECHR in respect of private life.

89. Turning to the facts of this case; I have considered the evidence in the round, in particular: my findings and conclusions at paragraphs 76, 78 and 85 above and the concession, on behalf of the Secretary of State, that it is more likely than not that the family link would have been accepted had the CRS check in August 2019 returned the results it did in June 2020. Having done so, I consider that a positive obligation to accept the Claimant arose on 20th August 2019, the date of the unlawful refusal of the TCR. There was therefore a delay of 10.5 months before the TCR was eventually accepted. On the facts, the consequences of this delay was of sufficient gravity for the Claimant as to amount to a disproportionate interference with his family life under Article 8(1) ECHR. The Claimant was only 14 years old. He was on his own in a foreign, unknown country. He was recovering from a traumatic journey, grieving for his father and separated from his sister who he had grown up with.

Conclusion

90. For the reasons given above, the claim succeeds. The Secretary of State acted unlawfully in refusing the TCR request on four separate occasions between August 2019 – July 2020. In doing so she was in breach of her common law duty of inquiry; Articles 6(4), 8 and 22(1) of Dublin III and Article 3(2) of the Implementing Regulation. The consequent delay in transferring the Claimant to the UK amounted to a disproportionate interference with his family life under Article 8 ECHR and Article 7 CFR.